

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Request of)	
)	
BKM Enterprises)	Facility I.D. No. 170183
)	NAL/Acct. No. MB200741410355
For Waiver of Auction No. 68)	FRN: 0015712433
Form 301 Filing Deadline)	File No. BNPH-20070301ACG
)	
Application for Construction Permit for)	
New FM station, Perry, Florida)	

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: August 14, 2007

Released: August 15, 2007

By the Chief, Audio Division:

I. INTRODUCTION

1. The Commission has before it the March 1, 2007, request of BKM Enterprises (“BKM”), for waiver of the post-auction Form 301 long-form application filing deadline. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (“NAL”)*, issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),¹ by the Chief, Audio Division, Media Bureau, by authority delegated under Section 0.283 of the Rules,² we find that BKM apparently willfully violated Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules by failing to timely file a post-auction Form 301 application.³ Based upon our review of the facts and circumstances before us, we conclude that BKM is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also grant BKM’s waiver request and accept its application for filing.

II. BACKGROUND

2. On August 24, 2006, the Media Bureau and the Wireless Telecommunications Bureau (collectively, the “Bureaus”) jointly released a Public Notice announcing a January 10, 2007, auction of FM broadcast construction permits, Auction No. 68.⁴ BKM timely filed a FCC Form 175 application to participate in FM Auction No. 68, and was found to be a qualified bidder.⁵ By a January 25, 2007, Public Notice, the Bureaus announced that BKM was the winning bidder in FM Auction No. 68 for the FM

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a).

⁴ *Auction of FM Broadcast Construction Permits Scheduled for January 10, 2007*, Public Notice, 21 FCC Rcd 9482 (MB/WTB 2006).

⁵ *Auction of FM Broadcast Construction Permits – 32 Bidders Qualified to Participate in Auction No. 68*, Public Notice, 21 FCC Rcd 14640 (MB/WTB 2006).

construction permit in Perry, Florida.⁶ Winning bidders were to file a post-auction FCC Form 301 long-form application by February 26, 2007. The *Auction No. 68 Closing Public Notice* cautioned that “[a]n applicant that fails to submit the required long-form application before the specified deadline, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in Section 1.2104(g) of the Commission’s rules.”⁷ BKM failed timely to submit a post-auction Form 301 application. Its Form 301 application (the “Application”) was submitted on March 1, 2007, along with a request for a waiver of the filing deadline set forth in Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules, as well as the *Auction No. 68 Closing Public Notice*.⁸

3. In its request for waiver, BKM states that this was its first auction experience, and that it “was under the impression that once the final payment was made, the Commission would issue the permit automatically.”⁹ BKM further states that when the permit was not issued, it contacted the Commission’s staff and was informed of the need to file Form 301, whereupon it “immediately engaged counsel and its consulting engineer to assist in the preparation of the required long form application.”¹⁰ BKM contends that a grant of a waiver of the filing deadline is in the public interest because it will not prejudice any other party, the winning bid was paid on time, and there is “ample opportunity” for petitions to deny to be filed.¹¹

III. DISCUSSION

4. *Waiver Request.* Ordinarily, a winning bidder that fails to timely file the required long-form application is deemed to have defaulted, its application is dismissed, and it is subject to the default payment set forth in Section 1.2104(g) of the Rules.¹² However, the Commission may, for good cause, determine that a late filed long-form application should be accepted.¹³ When an applicant seeks a waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action.¹⁴ “A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁵

5. The Commission has previously granted waivers of the post-auction long-form application filing deadline when minor, inadvertent, post-auction delinquencies did not disrupt the auction process, nor undermine the Commission’s policy of facilitating rapid implementation of service to the

⁶ *Auction of FM Broadcast Construction Permits Closes – Winning Bidders Announced for Auction No. 68*, Public Notice, 22 FCC Rcd 518 (MB/WTB 2007) (“*Auction No. 68 Closing Public Notice*”).

⁷ *Id.* at 522-23.

⁸ 47 C.F.R. §§ 73.3573(f)(5)(i), 73.5005(a). These Sections require a winning bidder to file its long-form application within 30 days of the release of the public notice announcing the close of the auction.

⁹ Exhibit 1 to Application.

¹⁰ *Id.*

¹¹ *Id.*

¹² 47 C.F.R. § 1.2104(g).

¹³ 47 C.F.R. § 73.5005(a).

¹⁴ *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). In addition, Section 73.3566(a) of the Commission’s radio broadcast rules provides that requests for waiver “shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.” 47 C.F.R. § 73.3566(a).

¹⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

public.¹⁶ We find that BKM has presented sufficient facts that, when considered in their totality, demonstrate circumstances that meet the standard for waiver of the application filing deadline. The record indicates that, prior to its late filing of the Form 301 application, BKM had complied with all previous Auction No. 68 requirements, including all filing and payment obligations, and was found to be a qualified bidder. While BKM's assumption that a construction permit would automatically issue without further action on its part evidences inattention to the clearly delineated post-auction procedures and the Form 301 filing deadline announced in the *Auction No. 68 Closing Public Notice*, we find no evidence of bad faith on its part. Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to BKM's record of prior compliance with auction-related requirements, and its prompt action taken to remedy its error once that was called to its attention.

6. We also recognize that the FM licensing process was not significantly delayed nor materially adversely affected by BKM's late filing of the application here. Accepting BKM's Form 301 application would not undermine the Commission's broadcast auction policies. Thus, flexibility is appropriate in this instance. We find it in the public interest to avoid a delay in implementing new service to Perry, Florida, by having to re-auction the FM construction permit, and therefore grant BKM's waiver request below. Although we grant BKM a waiver of the rules that would otherwise require dismissal of its late-filed long-form application, and associated imposition of a default payment, we nonetheless find that it apparently failed to comply with the rules requiring timely submission of the post-auction Form 301 application.

7. *Proposed Forfeiture.* In this case, BKM has admitted that it failed to timely file a post-auction Form 301 application, as required by Sections 73.3573(f)(5)(i) and 73.5005(a) of the Rules.

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁷ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁹ and the Commission has so interpreted the term in the Section 503(b) context.²⁰

9. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.²¹ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²²

¹⁶ See, e.g., *Gulf Coast Community College*, 20 FCC Rcd 17157 (MB 2005); *Silver Palm Communications, Inc.*, 17 FCC Rcd 6606, 6607 (WTB 2002); *City Page & Cellular Services, Inc.*, 17 FCC Rcd 26109, 22611-12 (WTB 2002); *Pinpoint Communications, Inc.*, 14 FCC Rcd 6421 (WTB 1999).

¹⁷ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1).

¹⁸ 47 U.S.C. § 312(f)(1).

¹⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

²¹ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

²² 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

10. In this case, BKM was on notice that it was responsible for timely submitting its post-auction Form 301 application, but failed timely to file its application. Taking into consideration these facts and the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in the full base amount of \$3,000.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that BKM Enterprises is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$3,000 for its apparent willful violation of Sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, BKM Enterprises SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

14. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²³

17. IT IS FURTHER ORDERED, that BKM Enterprises's Request for Waiver of the Form 301 Filing Deadline IS GRANTED and the Application will be processed in accordance with post-auction procedures.

²³ See 47 C.F.R. § 1.1914.

18. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to BKM Enterprises, 540 Maple Valley, Farmington, Missouri 63640, and to its counsel, Scott C. Cinnamon, Esquire, Law Offices of Scott C. Cinnamon, PLLC, 1090 Vermont Avenue, NW, Suite 800 # 144, Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau